INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	5
Summary of Argument	7
Argument:	
Introduction	10
I. Since hearings in deportation proceedings are not required by any statute, but are accorded as a matter of due process of law, such hearings are not subject to Sections 5, 7, 8 and 11 of the Administrative Procedure Act	17
A. Sections 5, 7, 8 and 11 of the Administrative Procedure Act are applicable only to cases in which the Congress has expressly required an opportunity for an administrative hearing	18
The legislative history of the Administrative Procedure Act	18
The practical importance of a literal interpretation	30
The administrative construction	31
B. Congress has not specifically required an opportunity for an administrative hearing in deportation cases	32
C. The subsequent judicial and legislative history	37
II. The exception in Section 7 (a) of the Administrative Procedure Act for the conduct of proceedings by officers specifically provided for by statute permits immigrant inspectors to conduct deportation hearings	43
A. Section 16 of the Immigration Act of 1917 "specially provides" for the conduct of deportation proceedings by immigrant inspectors within the meaning of Section 7 (a) of the Administrative Procedure Act	47
B. The exception to Section 7 (a) which permits the conduct of deportation hearings by immigrant inspectors also exempts them from the general requirements of Section 5 (c) to the extent necessary to give effect to the exception	55
Conclusion	58

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CITATIONS

Cases:

A. F. of L. v. *Watson*, 327 U. S. 582 37
American Stevedores v. *Porello*, 330 U. S. 446 27
Azzolini v. *Watkins*, 172 F. 2d 897 ..... 47, 49
Beroff v. *Donaldson*, 174 F. 2d 494 ..... 31, 36, 39
Bilokumsky v. *Tod*, 263 U. S. 149 36
Bridges v. *Wixon*, 326 U. S. 135 35
Chin Fat Neu v. *Zimmerman*, unreported, E. Dist. of Pa. 1949, Civ. M–1282 47
Chow Kau v. *Clark*, 83 F. Supp. 969 47
Costanzo v. *Tillinghast*, 287 U. S. 341 49
Eisler, et al. v. *Clark*, 77 F. Supp. 610 ..... 37, 39, 40, 47
Fajardo v. *United States*, unreported, S. D. N. Y., June, 1948 39
Frisch v. *Miller*, unreported, D. C., Fla. 1949, No. 3192–
Graham v. *United States*, 99 F. 2d 746 49
Japanese Immigrant Case, The, 189 U. S. 86 34
Johnson v. *Shaughnessy*, 336 U. S. 806 47
Johnson v. *Watkins*, 170 F. 2d 1009 47
Kessler v. *Strecker*, 307 U. S. 22 36
Kwock Jan Fat v. *White*, 253 U. S. 454 35
Kurth, Ex parte, 28 F. Supp. 258 49
Lee Wo Shing v. *Clark*, 175 F. 2d 194 47
Loufakis v. *United States*, 81 F. 2d 966 49
Low Wah Suey v. *Backus*, 225 U. S. 460 36
Lucas v. *American Code Co.*, 280 U. S. 445 49
Ottesen v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 50–5 47
Perfumo v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 49–569 47
Potash v. *McGrath*, certiorari denied Nov. 14, 1949 39
Prince v. *Commissioner*, unreported, N. Dist. of Ohio, E. D. 1949, Civ. No. 25968 47
Tang Tun v. *Edsell*, 223 U. S. 673 36
Tisi v. *Tod*, 264 U. S. 131 36
Trinler v. *Carusi*, 166 F. 2d 457, 168 F. 2d 1014 48
United States v. *Doshen*, 133 F. 2d 757 49
Valenti v. *Clark*, 83 F. Supp. 167 ..... 47, 48
Vajtauer v. *Commissioner of Immigration*, 273 U. S. 103 35
Wong So Wan, Ex parte, 82 F. Supp. 60 47
Yanish v. *Wixon*, 81 F. Supp. 499 ..... 47, 48
Yiakoumis v. *Hall*, 83 F. Supp. 469 48

Statutes:

Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*:
Sec. 2 14
Sec. 5 ..... 3, 6, 8, 9, 13, 14, 15, 16, 17, 30, 40, 44, 46, 55, 56

Statutes—Continued

Administrative Procedure Act of June 11, 1946—Con. Page

Sec. 7 ..... 4, 7, 8, 9, 10, 13, 15, 16, 17, 30, 43, 44, 45, 46, 49, 50, 51, 56, 57

Sec. 8 ..... 8, 16, 17, 30, 46

Sec. 10 48

Sec. 11 ..... 4, 6, 8, 9, 15, 17, 30, 44, 45, 46

Immigration Act of February 5, 1917, 39 Stat. 874, as amended:

Sec. 16, 8 U. S. C. 152 ..... 2, 7, 9, 13, 33, 44, 45, 48, 50, 54

Sec. 19, 8 U. S. C. 155 ..... 3, 33

Sec. 20, 8 U. S. C. 156 33

Immigration Act of 1924, 43 Stat. 153:

Sec. 3 (5), 8 U. S. C. 203.5 5

Sec. 14, 8 U. S. C. 214 6

Sec. 19, 8 U. S. C. 166 5

Interstate Commerce Act, 49 U. S. C. 1 *et seq.*:

Sec. 13 (3) 51

Sec. 17 (2) 52

Mail Fraud Statute, 39 U. S. C. 259, 732 31

1 U. S. Code 112, 204 (a) 2

Securities Act, Sec. 8, 15 U. S. C. 77h 15

19 U. S. C. 1641 52

Miscellaneous:

Annual Report, Commissioner of Immigration and Naturalization (1948), p. 23 41

Attorney General's Manual on the Administrative Procedure Act (1947), p. 41 32

8 C. F. R. 90.3 12

8 C. F. R. 120.21 5

8 C. F. R. 120.37 6

8 C. F. R. 150.1 11

8 C. F. R. 150.2 11

8 C. F. R. 150.3 11

8 C. F. R. 150.4 11

8 C. F. R. 150.6 (a) 11

8 C. F. R. 150.6 (b) 11, 56, 58

8 C. F. R. 150.6 (d) 12

8 C. F. R. 150.6 (e) 12

8 C. F. R. 150.6 (n) 11

8 C. F. R. 150.7 (a) 12

8 C. F. R. 150.7 (c) 12

8 C. F. R. 150.7 (d) 12

8 C. F. R. 150.7 (e) 12

8 C. F. R. 150.9 12

8 C. F. R. 150.12 12

Miscellaneous—Continued

	Page
The Federal Administrative Procedure Act and the Administrative Agencies (New York University, 1947), pp. 296–297	32
Final Report of Attorney General's Committee on Administrative Procedure (1941)	14, 19
H. Doc. No. 986, 76th Cong., 3d Sess.	19
H. R. 6324, 76th Cong., 3d Sess.	18
H. R. 5081, 78th Cong., 2d Sess.	25
H. R. 1203, 79th Cong., 1st Sess.	25, 51, 57
H. R. 1206, 79th Cong., 1st Sess., Sec. 301	25
H. R. 6652, 80th Cong., 2d Sess.	38
H. R. 10, 81st Cong., 1st Sess.	40
H. Rep. 1980, 79th Cong., 2d Sess.	28, 41
H. Rep. 2140, 80th Cong., 2d Sess.	38
H. Rep. 1192, 81st Cong., 1st Sess., p. 11	40
Hearings before Senate Judiciary Subcommittee on Immigration and Naturalization on S. 2755, 80th Cong., 2d Sess. (1948)	39, 43
Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, 77th Cong., 1st Sess., (1941) on S. 674, S. 675 and S. 918	20, 21–24, 28, 29
Reorganization Plan No. V, 5 F. R. 2223, Effective June 14, 1940, 5 F. R. 2132	36
S. 674, 77th Cong., 1st Sess., Sec. 309 (b)	14, 51
S. 675, 77th Cong., 1st Sess., Sec. 301	51
S. 2030, 78th Cong., 2d Sess.	25
S. 7, 79th Cong., 1st Sess.	25
S. 2755, 80th Cong., 2d Sess.	38
S. Doc. 248, 79th Cong., 2d Sess.	26, 27, 28, 52, 53
S. Rep. 752, 79th Cong., 1st Sess.	27

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG, PETITIONER

v.

J. HOWARD MCGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 8) is reported at 174 F. 2d 158. The opinion of the District Court is reported at 80 F. Supp. 235.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1949 (R. 9). The petition for a writ of certiorari was filed July 1, 1949 and was

granted October 10, 1949. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether administrative hearings in deportation cases must be conducted in accordance with Sections 5 (c), 7 (a) and 11 of the Administrative Procedure Act.

STATUTES INVOLVED

The authority of immigrant inspectors is defined in Sec. 16 of the Immigration Act of February 5, 1917, 39 Stat. 874, 885, as amended, 8 U. S. C. 152, which provides, in part, that:

> * * * The inspection * * * of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this Act.[1] shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. * * * Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; * * *.

[1] The original act, 39 Stat. 886, reads "under this Act", although in the codification, 8 U. S. C. 152, it reads "under this section." The former is controlling. 1 U. S. Code 112, 204 (a).

Authority for the deportation of aliens unlawfully in the United States is granted by Sec. 19 (a) of the Immigration Act of February 5, 1917, as amended, 8 U. S. C. 155 (a), which provides, in part, that:

> * * * any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States * * * shall, upon the warrant of the Attorney General, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final.

Sec. 5 of the Administrative Procedure Act of June 11, 1946, 60 Stat 237, 239, 5 U. S. C. 1004, establishes a number of formal requirements to be applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Petitioner invokes that portion of Sec. 5 (c) which declares that the administrative officer who presides at the reception of evidence shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency."

Sec. 7 (a) of the Administrative Procedure Act, 5 U. S. C. 1006, provides in part:

> In hearings which section 4 or 5 requires to be conducted pursuant to this section—
>
> (a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

Sec. 11 of the Administrative Procedure Act, 5 U. S. C. 1010, provides in part:

> Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners

shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. * * *

STATEMENT

Petitioner is a native and citizen of China. He arrived at the port of New York, N. Y. on April 21, 1946 as a member of the crew of the SS Silver Walnut. Upon arrival he was granted shore leave for a period not exceeding 29 days, in conformity with law.[2] However, he did not return to his ship, overstayed his allotted period of shore leave, and continued to remain unlawfully in the United States.

Petitioner was taken into custody by the Immigration and Naturalization Service on or about October 14, 1947, under a warrant of arrest issued October 13, 1947, and thereafter was released on bail pending disposition of his case. He was granted hearings before an immigrant inspector on December 11, 1947, and January 29, 1948. At those hearings he was represented by counsel. At the conclusion of the hearings, the immigrant inspector recommended that he be deported.

[2] Sections 3 (5) and 19, Immigration Act of 1924, 8 U. S. C. 203 (5) and 166; 8 CFR 120.21.

Upon considering the evidence in the record of hearing, the Acting Commissioner of Immigration and Naturalization, on March 22, 1948, concluded that petitioner was subject to deportation under Section 14 of the Immigration Act of 1924, 8 U. S. C. 214, on the ground that he had remained in the United States for a longer time than permitted by the terms of his admission.[3]

Petitioner then appealed to the Board of Immigration Appeals and, on May 24, 1948, his counsel was allowed to offer oral argument before that Board. On June 4, 1948, the Board of Immigration Appeals dismissed petitioner's appeal and affirmed the order of the Acting Commissioner directing that he be deported to China.[4]

Petitioner was thereupon taken into custody under the order and warrant of deportation. He then brought habeas corpus proceedings in the United States District Court for the District of Columbia challenging the deportation process on the ground that it had not been conducted in conformity with Secs. 5 and 11 of the Administrative Procedure Act (R. 2–4). A writ of habeas corpus was issued (R. 4–5) and a return was filed (R. 7). Following a hearing, Judge Holtzoff on July 29, 1948, discharged the writ and remanded petitioner

[3] See also 8 CFR 120.37.

[4] This recital of the factual background is based on the original records of the Immigration and Naturalization Service.

to custody on the ground that Sec. 7 (a) of the Administrative Procedure Act, viewed in conjunction with Sec. 16 of the Immigration Act of 1917, exempted deportation hearings from the general requirement that hearings be conducted by hearing examiners appointed in accordance with Section 11 of the Administrative Procedure Act (80 F. Supp. 235; R. 6, 7).

Petitioner appealed to the Court of Appeals for the District of Columbia Circuit which in a *per curiam* opinion, affirmed on the opinion of Judge Holtzoff (R. 8, 9). The Government did not oppose the issuance of a writ of certiorari in this case, since the questions raised in the petition are of obvious importance in the administration of immigration laws, and an authoritative decision by this Court was deemed desirable.

SUMMARY OF ARGUMENT

This case involves only the naked issue of whether hearings in deportation proceedings are required to be conducted in accordance with Sections 5 (c), 7 and 11 of the Administrative Procedure Act. In terms of administration, the question is whether such hearings must be conducted by hearing examiners appointed in accordance with Section 11, or whether immigrant inspectors may continue to conduct them. The facts requiring petitioner's deportation are undisputed, and he does not assert any denial of

procedural due process under the Fifth Amendment in the proceedings leading to the order for his deportation.

I

Deportation proceedings are "adjudication" for the purposes of the Administrative Procedure Act. The hearing examiner requirements of Section 11 and the separation of functions requirements of Section 5 (c) invoked by petitioner are expressly made applicable only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." The legislative history of the Act compels a strict interpretation of these words so as to make Sections 5, 7, 8 and 11 applicable only to cases as to which Congress by some other statute has specifically required an opportunity for an administrative hearing. It is only by such a construction that the Congressional purpose of making the application of the Act clear and predictable can be effectuated.

Congress, in the Immigration Acts, has never specifically required opportunity for hearing in deportation proceedings, although opportunity for hearing is required by the due process clause of the Fifth Amendment. The legislative history of the Administrative Procedure Act reveals that Congress was fully informed of the practical difficulties which would result from application of that Act to immigration procedures, and

strongly suggests that the precisely drawn coverage provisions were intended to exclude such procedures. In any event, Congress is fully aware of the administrative construction of the Act as not applying to deportation proceedings, and has at least acquiesced in that interpretation.

II

As a separate basis of decision, the Government contends that deportation proceedings are excepted from the provisions of the Administrative Procedure Act invoked by petitioner by Section 7 (a) of that Act. Section 7 (a) provides that nothing in the Act shall supersede the conduct of administrative proceedings by "officers specially provided for by or designated pursuant to statute" for that purpose. Since Section 16 of the Immigration Act of 1917 specifically authorizes, if, indeed, it does not require, the conduct of deportation proceedings by immigrant inspectors, it follows that such proceedings are not required to be conducted by examiners appointed in accordance with Section 11 of the Administrative Procedure Act.

Immigrant inspectors who, under Section 7 (a) may conduct deportation proceedings because they are "officers specially provided for" by the Immigration Act, are likewise excepted from the provision of Section 5 (c) that hearing officers shall not be "responsible to or subject to the

supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." This follows from the fact that Section 7 (a) does not merely authorize officers "specially provided for" by statute to continue to act as hearing officers, but provides expressly that "nothing in this Act shall supersede the conduct" of proceedings by such officers. Clearly, immigrant inspectors who have been expressly authorized by Congress to conduct deportation proceedings are not to be precluded from doing so because of their status in the Immigration and Naturalization Service as immigrant inspectors.

ARGUMENT

INTRODUCTION

The sole issue in this case is whether the administrative hearing which resulted in an order for petitioner's deportation should have been conducted before a hearing examiner appointed in accordance with Section 11 of the Administrative Procedure Act and functioning in accordance with Section 5 (c) of that Act. Petitioner was given a full hearing before an immigrant inspector, and there is no claim that this hearing was unfair in any respect or that petitioner was deprived of any right which the courts have held to be embodied in due process of law as applied to the deportation of aliens. The facts

are undisputed, and the petitioner is obviously deportable.

The order for petitioner's deportation was the result of a proceeding conducted as follows: Whenever a preliminary investigation indicates prima facie that an alien may be subject to deportation, 8 CFR 150.1, application is made for the issuance of a warrant of arrest. 8 CFR 150.2. Such a warrant may issue only if it is determined that probable cause exists, and its issuance must be authorized by a designated official of the Central Office of the Immigration and Naturalization Service, or, in certain instances, by an officer in charge of a field district. 8 CFR 150.3. When the alien is arrested, he is furnished with a copy of the warrant and notified of his right to counsel and release under bond. 8 CFR 150.4. After a reasonable time to enable the alien to prepare his defense and obtain counsel, he is granted a hearing to determine whether he is subject to deportation. 8 CFR 150.6 (a). The immigrant inspector assigned to conduct the hearing, known as the presiding inspector, cannot be the same officer who conducted the investigation unless the alien consents. 8 CFR 150.6 (b). The officer in charge of the district may assign a second immigrant inspector, known as the "examining inspector", to present the evidence on behalf of the Government. 8 CFR 150.6 (n). However, in the ordinary case the presiding in-

spector conducts the hearing alone, incorporates all available evidence in the record, and interrogates all witnesses. 8 CFR 150.6 (b). The alien and his counsel may participate fully in the hearing, offer evidence, make appropriate objections and exceptions, and examine and cross examine witnesses. 8 CFR 150.6 (d) and (e).

After the hearing is concluded, the presiding inspector prepares proposed findings of fact and conclusions of law and a proposed order on the basis of the evidence adduced at the hearing. 8 CFR 150.7 (a) and (c). A copy of the proposed findings, conclusions, and order is served on the alien or his counsel, who are allowed a reasonable time to file exceptions. 8 CFR 150.7 (d) and (e). The record is then forwarded to the Central Office for a decision by the Commissioner or an officer designated by him. 8 CFR 150.9. The alien may appeal to the Board of Immigration Appeals from an adverse order of the Commissioner. 8 CFR 90.3. If the alien's deportation eventually is ordered, he is taken into custody under a warrant of deportation, if not already in custody, and deported. 8 CFR 150.12.

The above procedure governs the conduct of almost 2,000 deportation hearings per month. The Government admits that the administrative hearing in the instant case, like the hearing in other deportations cases, was not conducted by a hearing examiner appointed in ac-

cordance with Section 11 of the Administrative Procedure Act, and that there was not full compliance with the separation of functions requirements of Section 5 (c). It is the Government's position, first, that the hearing in deportation proceedings is not required by the Immigration Act (although required by due process of law) and therefore is not a hearing "required by statute" within the meaning of the introductory clause of Section 5 of the Administrative Procedure Act; if that contention is correct, it follows that deportation proceedings are not subject to any of the provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act. The Government also contends that even if the hearing in deportation proceedings is held to be a hearing "required by statute" within the meaning of Section 5, nevertheless the requirement of Section 7 (a) that hearings be conducted by examiners appointed in accordance with Section 11 is inapplicable, since Congress has directed, in Section 16 of the Immigration Act of 1917, that deportation proceedings be conducted by immigrant inspectors, who are therefore within the express exception of Section 7 (a) for "officers specially provided for by or designated pursuant to statute". We further contend that this exception under Section 7 (a) for special statutory hearing officers carries with it as much of an exception from the separation of functions requirements

of Section 5 (c) as is necessary to give effect to the express exception of Section 7 (a). Upon either basis, the hearing leading to the order for petitioner's deportation was not required to be conducted by a hearing examiner appointed in accordance with Section 11 of the Administrative Procedure Act and functioning in accordance with the separation of functions requirements of Section 5 (c).

The Administrative Procedure Act is the result of long study of the administrative procedures of Federal administrative agencies. Its roots are in the Report of the Attorney General's Committee on Administrative Procedure and in the extensive hearings conducted in 1941 by a subcommittee of the Senate Committee on the Judiciary on S. 674 and other bills. Leaving aside the portions of the Act dealing with public information, licensing and judicial review, the Act establishes minimum procedural requirements for "rule making" and "adjudication". A proceeding conducted by the Immigration and Naturalization Service to determine whether a particular alien should be deported, is clearly "adjudication" within the definition of Section 2 (d) of the Act.

Section 5 of the Administrative Procedure Act defines the cases of adjudication which must be conducted in accordance with the provisions of Sections 5, 7 and 8; those provisions are made

applicable to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," with some exceptions not relevant here. In such cases, the notice of hearing must comply with Section 5 (a) and procedures for informal settlement must be afforded in accordance with Section 5 (b). Section 7 (a) requires that in cases subject to Section 5 the hearing must be conducted by the head of the agency involved or one of the members of a multi-headed agency, e. g., a commission, or by an examiner appointed in accordance with Section 11. For example, a hearing under Section 8 of the Securities Act (15 U. S. C. 77h) may be conducted by the Securities and Exchange Commission itself, by one or more members of the Commission, or by an examiner appointed in accordance with Section 11 of the Administrative Procedure Act. A hearing examiner appointed in accordance with Section 11 is given a status independent of the agency which he serves, in that his compensation, promotion and removal are placed in the control of the Civil Service Commission. Section 11 also provides that such examiners "shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners." However, Section 7 (a) also provides that "nothing in this Act shall be deemed to supersede the conduct of specified classes of

proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 7 (b) specifies the powers which are to be exercised by officers presiding at hearings with respect to such matters as subpenas. Section 5 (c) provides that the officer presiding at a hearing shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." The latter persons are also prohibited from participating, except as witnesses or counsel in public proceedings, in the hearing officer's initial or recommended decision or in the agency's final decision. These are the "separation of functions" requirements of the Administrative Procedure Act.

Under Section 8, which by its terms applies only to cases governed by Section 7, there must be made, and submitted to the parties with an opportunity to file exceptions, an intermediate decision which may be either a tentative or proposed decision by the agency itself, or a decision by the hearing officer which in turn may be either a recommended decision or an "initial" decision which will become final in the absence of appeal to or review by the agency.

I

SINCE HEARINGS IN DEPORTATION PROCEEDINGS ARE NOT REQUIRED BY ANY STATUTE, BUT ARE ACCORDED AS A MATTER OF DUE PROCESS OF LAW, SUCH HEARINGS ARE NOT SUBJECT TO SECTIONS 5, 7, 8 AND 11 OF THE ADMINISTRATIVE PROCEDURE ACT.

The hearing examiner requirements embodied in Sections 7 (a) and 11 of the Administrative Procedure Act and the separation of functions requirements of Section 5 (c) are applicable only to cases of adjudication in which a hearing is "required by statute," i. e., by some statute other than the Administrative Procedure Act. This follows from the fact that Section 5 by its introductory clause is applicable only to such cases, Sections 7 and 8 by their express terms are applicable only to hearings which are required to be conducted in accordance with Section 5, and Section 11 applies only to appointment of such "examiners as may be necessary for proceedings pursuant to sections 7 and 8." Thus, none of these sections are applicable to deportation proceedings unless the hearings in deportation proceedings are hearings "required by statute", i. e., by the Immigration Act of 1917. We will show that Section 5 (and, therefore, Sections 7, 8 and 11) of the Administrative Procedure Act are applicable only to cases as to which the Con-

gress has expressly required an opportunity for hearing, and that the Congress has never specifically required hearings in deportation proceedings although such hearings are required by due process of law. It will also be shown that the Congress is fully aware that the Immigration and Naturalization Service has at all times construed Sections 5, 7, 8 and 11 of the Act as not applying to deportation proceedings and, that with such knowledge the Congress has at least acquiesced in this interpretation.

A. SECTIONS 5, 7, 8 AND 11 OF THE ADMINISTRATIVE PROCEDURE ACT ARE APPLICABLE ONLY TO CASES IN WHICH THE CONGRESS HAS EXPRESSLY REQUIRED AN OPPORTUNITY FOR AN ADMINISTRATIVE HEARING.

A most important problem in the drafting of the Administrative Procedure Act was to determine to what administrative actions it should apply. This was met by providing that Articles 5, 7, 8 and 11 should apply only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing." By this provision, Congress sought to enable private persons and administrators to determine readily the proceedings to which these sections are applicable.

The legislative history of the Administrative Procedure Act.—The failure to resolve that problem in the Walter-Logan bill (H. R. 6324, 76th Cong., 3d Sess.) was one of the reasons

which led President Roosevelt to veto that bill. As Attorney General Jackson advised the President: "This bill, however, lays down a series of blanket requirements for the promulgation of rules and the conduct of hearings by administrative agencies and for judicial review of their action. In doing so it amends literally hundreds of statutes. Just what statutes are amended or repealed is not stated, but left to the always debatable implication." House Document No. 986, 76th Cong., 3d Sess. (1940) p. 8.

In 1941, the Attorney General's Committee on Administrative Procedure issued its Final Report. This report contained drafts of two proposed bills—embodying the so-called majority and minority recommendations. Under both proposals, the provisions relating to formal adjudication were applicable only to proceedings in which a hearing was "required by law."[5]

[5] Section 301 of the majority draft provided that "The provisions of sections 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing." Final Report, p. 195. Section 301 of the minority draft contains a similar provision. Final Report, pp. 232–233.

There was no exemption of deportation hearings, as such. Indeed, the Committee apparently contemplated that its recommendations regarding independent hearing commissioners would include the Immigration and Naturalization Service. Final Report, p. 46, n. 4.

Various bills to effectuate the majority and minority recommendations of the Attorney General's Committee were introduced in 1941. The Senate Judiciary Committee conducted extended hearings on these bills.[6] Major Schofield, then the active head of the Immigration and Naturalization Service, testified at some length concerning the impact of the projected legislation. *Senate Hearings* (1941), p. 556 *et seq.* He stated, in the testimony quoted at p. 8 of the petition herein, that the legislation then under consideration[7] apparently would embrace deportation procedures. However, his testimony included many other highly significant facets. For example, he called attention to the ambiguity of the phrase "required by law," and suggested that there should be some clarification of this language (Id., p. 577):

> We think that that ought to be made more specific and that it ought to read something like this: That they shall apply "only to proceedings wherein rights, duties or other legal relations are *required by the constitution or statutes* to be determined after opportunity for formal hearing, and if such a hearing be held, only upon the basis of a record made in the course of such hearing.

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[6] Printed as *Hearings before a Subcommittee of the Committee on the Judiciary*, United States Senate, 77th Cong., 1st Sess., on S. 674, S. 675, and S. 918 (1941), and herein referred to as *Senate Hearings* (1941).

[7] Which provided for hearings "required by law."

> In other words, so that it would be clear that this statute would apply only to those matters of administrative function in our service, which are disposed of by formal hearing. This would mean exclusion cases and deportation cases. [Emphasis supplied.]

Acting Attorney General Biddle likewise suggested that "statute or constitution" be substituted for "law", in order to clarify the statute's scope. *Id.*, p. 1456. A similar suggestion was made by Interstate Commerce Commissioner Aitchison, who declared (*id.*, p. 453–4):

> Further, the bill speaks of a hearing "required by law". Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard.

Moreover, at another point in his testimony, Major Schofield emphasized the practical difficulties and expenses that would be incurred by the Immigration and Naturalization Service. His statements illuminate the subsequent course of legislative action (*id.*, p. 573–574):

> Major SCHOFIELD. The committee must realize that an immigrant inspector performs many other duties in addition to conducting hearings, and his services would still be required to perform those other duties. Ships must be boarded, seamen must be examined and fingerprinted, papers must be lifted, trains must be boarded, air-

planes must be met and the passengers examined, and so on.

Last year, the fiscal year ending June 1940, we made at seaports alone 1,600,890 examinations of one kind or another. People seeking to come in—that includes everybody; sailors, passengers, citizens, non-citizens, every kind.

At the land-border ports there were arrivals to the number of 50,102,398.

Senator DANAHER. That includes border crossings, doesn't it?

Major SCHOFIELD. Everything. Repeated crossings. Commuters and everybody, but they all must be examined. It includes aliens and citizens, too, but there were that many examinations which had to be made by our Service. So that the total for the fiscal year ending 1940 was 51,703,288. Now that means that we must have an adequate staff and force of immigrant inspectors, and so if we are by statute now to provide for hearing commissioners in the main, not entirely, but in the main they will have to be appointed new. Additional personnel in our Service.

Now when it is remembered that we have 22 districts throughout the United States and its insular possessions, 226 ports of entry, and an additional 153 interior offices like Pittsburgh, Cincinnati, Kansas City, Salt Lake City, Denver, and St. Louis, where deportation hearings must take place, and when it must be remembered that—

and when it must be recalled that we must have boards of special inquiry, or under the new statute, hearing commissioners, to do the work that our boards of special inquiry now perform, namely, to sit on the right of aliens to enter, and determine whether they should be excluded; and they must be available when boats arrive at ports of entry or when trains arrive at land ports and airplanes arrive, and taking into consideration also that there could be some moving about, shifting of hearing commissioners from one point to another, bearing in mind also, however, the vast distances in some of our districts, especially out in the West, we have estimated that it would require 225 hearing commissioners over and above our present personnel at an average salary of $5,000 per annum, or $1,150,000. *It isn't worth it. There is no purpose that can be served by the expenditure of that money.* Because I take it that these hearing commissioners would be confined in their duties to the duties prescribed in the statute, and they would be hearing commissioners, and that will, and that would also involve another economic waste because while they are waiting for a hearing I don't know what they would be compelled to do. Many of these hearings take less than an hour and require no witnesses and no great ability to conduct or decide.

Many of them are extraordinarily simple and relate to illegal entry, for instance, and

> the like, where no real complicated issue is involved either of law or fact. [Emphasis supplied.]

At the conclusion of the Senate Committee's hearings, the minority group of the Attorney General's Committee made a supplemental statement taking cognizance of criticisms and suggesting appropriate amendments. Mr. Carl McFarland acted as principal spokesman for this group, and his testimony included the following statement (*id.*, p. 1349):

> The Immigration Service (pp. 564–576) objects to the application of the title to some of its functions; the objection is well taken and section 301 should be amended by adding a further subdivision to exempt: "(i) the admission or control of aliens."

An observation and recommendation in identical language appears in the written statement and proposed revision of S. 674 submitted by this group. *Id.*, pp. 1390, 1411.

Thus, during the 1941 Senate hearings, the question was squarely raised as to what administrative proceedings should be subject to the proposed legislation. Also, a group of proponents of the legislation indicated their belief that there should be excepted from the formal adjudicatory requirements proceedings relating to "the admission or control of aliens"—an exception which would clearly cover deportation proceedings.

With the outbreak of the war, the subject of administrative procedure was left in abeyance until June 1944, when the Chairmen of the Senate and House Judiciary Committees introduced identical bills,[8] the procedural provisions of which were to be applicable "In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing". These bills contained no reference of any kind to immigration proceedings. It should be noted that these bills were the first to limit their application to cases in which hearings were required by statute. And the only introduced bill which ever provided an express exception for proceedings relating to "the admission or control of aliens", significantly, was one[9] which still referred to hearings "required by law".

In 1945, revised bills were introduced by the Chairmen of the Senate and House Judiciary Committees as S. 7 and H. R. 1203. These bills, after extensive revision, resulted in the Administrative Procedure Act. The history of these bills is replete with evidence that what are now Sections 5, 7, 8 and 11 of the Administrative Procedure Act were intended to apply only to cases of adjudication in which Congress, by some other

[8] S. 2030 and H. R. 5081, 78th Cong., 2d Sess.

[9] H. R. 1206, 79th Cong., 1st Sess. (1945), Section 301.

statute, had specifically required opportunity for an administrative hearing. Thus the Senate Judiciary Committee's Comparative Print of 1945, Sen. Doc. 248,[10] p. 21, contains the following statement:

> The introductory clause removes from the operation of sections 5, 7, and 8 all administrative procedures in which *Congress has not required* orders to be made upon a hearing, and the first of the further exceptions eliminates matters subject to a subsequent trial of the law and the facts de novo in any court. Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually *intentionally or traditionally* refrained from requiring an administrative hearing. [Emphasis supplied.]

The same report, in discussing Section 7, specifies that "the provisions of Section 7 respecting hearings are not designed to require hearings where Congress has not already done so by statute." *Id.*, p. 28.

[10] Senate Document No. 248, 79th Cong., 2d Sess., is a compilation of the legislative history of the Administrative Procedure Act. It includes the committee reports, debates and the 1945 hearings before the House Committee on the Judiciary.

Similarly, Mr. Carl McFarland again testified concerning the revised legislation before the House Judiciary Committee on June 21, 1945, in his capacity as Chairman of the American Bar Association's Committee on Administrative Law and stated, Sen. Doc. 248, p. 79:

> But none of the measures, I think, with one exception, provides that the procedure in respect to adjudication shall apply to any case *unless Congress has specifically, by some other statute, required an administrative hearing.* [Emphasis supplied.]

The Senate Committee report recommending favorable action on this legislation, Sen. Rep. 752, 79th Cong., 1st Sess., included an analysis of the bill made at the request of the Committee Chairman by the Attorney General, who stated without contradiction that the reference to hearings "required by statute" results in limiting Section 5 (and, therefore, Sections 7, 8 and 11) to *"cases in which the Congress has specifically required* a certain type of hearing."[11] [Emphasis supplied.] Sen. Doc. 248, p. 226. Moreover, the report itself stipulated that this language limited the operation of the pertinent statutes of the sec-

[11] The Attorney General's interpretation under these circumstances is "an indication of the Committee's opinion on the intended effect of the Act." *American Stevedores* v. *Porello*, 330 U. S. 446, 452 (1947). Moreover, representatives of the Department of Justice had worked closely with the Judiciary Committees on this legislation. Sen. Doc. 248, pp. 191, 248.

tion "to cases in which other statutes require the agency to act upon or after a hearing." *Id.*, p. 202. Identical language is found in the report of the House Judiciary Committee, Sen. Doc. 248, p. 260, and in the remarks of Representative Walter, sponsoring the bill on the floor of the House of Representatives, Sen. Doc. 248, p. 359. The report of the House Committee, House Rep. 1980, 79th Cong., 2d Sess., after referring to the 1941 testimony by various agencies, specifically including the Immigration and Naturalization Service, also made the following significant observations, Sen. Doc. 248, p. 247:

> It can be said fairly that no point raised by any agency in those very lengthy and detailed hearings has not been given full consideration in the drafting of the present bill, and indeed in almost every instance the present bill avoids the difficulties which Government agencies then feared * * *. Some agencies did not want hearings provided (pp. 1389–1398, 1394), and the present bill provides the details for hearings only *where other statutes require a hearing.* (See sec. 4 (b) and the introductory clause to sec. 5.) [Emphasis supplied.]

It should be observed that the page references in this quotation include page 1390 of Senate Hearings (1941) and it was on this page that the minority group in the Attorney General's

Committee on Administrative Procedure agreed with the objections of the Immigration Service and recommended the exemption of immigration functions.

To summarize the legislative history on this point: when, commencing in 1941, Congress sought to define precisely the cases of adjudication to which administrative procedure legislation would apply, it was because there was agreement that such legislation could not be applied to all actions of all administrative agencies. Also, it was not practical to list or enumerate the particular administrative proceedings to be covered. Therefore, it was proposed to apply the formal procedural requirements to cases in which a hearing was otherwise "required by law". Then the question was raised as to whether this phrase referred to hearings required by the statute or by the Constitution. Specifically, it was asked, "Does this, in a case where the statute is silent, require the agency to determine whether the Constitution implies a right to be heard?" (*supra,* p. 21). Apparently these questions, raised during the 1941 Senate Hearings, created doubt as to whether the concept of hearings "required by law" afforded sufficient predictability as to the application of the proposed legislation. For, thereafter, all of the administrative procedure bills which received serious consideration referred to hearings "required by statute".

Further, the legislative proceedings immediately preceding enactment of the Administrative Procedure Act make it abundantly clear that Sections 5, 7, 8 and 11 are to apply only where Congress in some other statute has *specifically* required an opportunity for a hearing.[12]

The practical importance of a literal interpretation.—In urging that the introductory clause of Section 5 of the Administrative Procedure Act be literally interpreted so as to make that section and Sections 7, 8 and 11, applicable only to cases in which Congress has expressly and in terms required an opportunity for an administrative hearing, the Government is concerned with considerations which go beyond the instant type of case. It is important that both private persons and administrative agencies shall be able to determine readily and with certainty the administrative proceedings to which the Act is applicable. Because the application of the Act involves no constitutional right, there is presented solely a question of what Congress intended. Since the Act became effective, all questions as to the applicability of Sections 5, 7, 8 and 11 have been re-

[12] We can find no specific explanation for the final omission of an express exception for proceedings relating to "the admission or control of aliens." During the extensive informal discussions which preceded the enactment of the Administrative Procedure Act, it may have been concluded that in the light of the general change in language discussed above there was no longer need for an express exception for deportation proceedings.

solved by determining whether Congress, in the substantive statute involved, had expressly required an opportunity for an administrative hearing. Where it had not, it was concluded that those sections were not applicable. Thus, the Department of Justice concluded that deportation proceedings were not subject to the Act because the Immigration Act does not expressly require an opportunity for a hearing. Similarly, the Post Office Department has concluded that mail fraud proceedings (39 U. S. C. 259, 732) are not subject to the Administrative Procedure Act. See *Bersoff* v. *Donaldson*, 174 F. 2d 494 C. A. D. C.). Moreover, it can be expected that in the future new regulatory statutes will be enacted by the Congress and will present questions as to the applicability of the Act. Where Congress has not specifically required a hearing, it is not always certain where and when the Constitution may require opportunity for a hearing. Thus, the application of the Administrative Procedure Act can be predicted safely only if the key phrase "required by statute" is given a literal interpretation as suggested by the legislative history.

The administrative construction.—At all times since the enactment of the Administrative Procedure Act, the Immigration and Naturalization Service of the Department of Justice has publicly taken the position that deportation proceedings are not subject to Sections 5, 7, 8 and 11 of the

Act.[13] In fact, thousands of deportation hearings have been conducted in the same manner as in the instant case. Similarly, the Post Office Department, relying upon a similar construction of Section 5, has continued to conduct mail fraud hearings without hearing examiners appointed in accordance with Section 11. Also, the Department of Justice has taken the general position that "The legislative history makes clear that the word 'statute' was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. * * * In cases where a hearing is held, although not required by statue, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply." *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 41.

B. CONGRESS HAS NOT SPECIFICALLY REQUIRED AN OPPORTUNITY FOR AN ADMINISTRATIVE HEARING IN DEPORTATION CASES

It is undisputed that the Congress has never specifically required an opportunity for an administrative hearing in proceedings for the deportation of an alien. The development of minimum procedural standards governing deportation proceedings has been entirely judicial, deriving

[13] See remarks of Commissioner of Immigration Carusi in February, 1947, reprinted in *The Federal Administrative Procedure Act and the Administrative Agencies* (New York University, 1947) pp. 296–297.

from the due process clause of the Fifth Amendment. Section 16 of the Immigration Act of 1917, 8 U. S. C. 152, provides for an "examination" of aliens arrested in deportation proceedings. Section 19 (a) of the same statute, 8 U. S. C. 155 (a) merely directs that any alien who is in the United States in violation of law "shall, upon the warrant of the Attorney General, be taken into custody and deported" and that "the decision of the Attorney General shall be final." Section 20, 8 U. S. C. 156, recognizes (but does not direct) that hearings may be given in deportation cases, by authorizing the release of the alien on bond pending final disposition of his deportation proceeding, conditioned upon his production "when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." But there is no explicit declaration in the immigration statutes *requiring* that a hearing be granted in each deportation case and that the adjudication must be made on the record of such hearing. The oblique reference found in Section 20 cannot be regarded as a statutory requirement that a hearing be held.

It is indisputable, of course, that aliens subjected to deportation proceedings always have been accorded hearings on the alleged grounds for deportation. But such hearings have emerged as a necessary corollary to the traditional precepts of fair play enunciated and developed by the

courts in applying the constitutional mandate of due process, rather than from any direct statutory requirement. The general observations cited in the petition (p. 11) do not in any way reject this concept. *The Japanese Immigrant Case,* 189 U. S. 86, 100, 101 (1903) considered a contention that the deportation statutes were unconstitutional because they did not provide for a hearing. The Court rejected that contention, concluding that a hearing was not precluded by the statute and that such a hearing was required by due process. The language quoted at p. 11 of the petition does not include the following significant observation (p. 100):

> Those [immigration] acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right.

The opinion of the Court, when considered in context, merely declares that the omission to provide specifically for a hearing does not bar it, and that the statute and Constitution, read together, supply full assurance that a fair hearing will be granted in each deportation proceeding. Moreover, in that case the Court found that the alien actually had been granted a hearing and that such hearing, though summary, had satisfied due process requirements. Essentially, this was the only substantial issue resolved by the Court in that case.

The quotation from *Bridges* v. *Wixon*, 326 U. S. 135, 160 (1945) relied on by petitioner (at p. 11) does not appear in the opinion of the Court but in Justice Murphy's concurring opinion, which was not adopted by any other member of the Court. And Justice Murphy's comment evidently was directed to the effect of a specific deportation statute rather than to a determination as to whether the requirement of a fair hearing was a part of the statute itself.

We believe that the true reading of many decisions of this Court is that the requirement of a hearing in deportation proceedings is a concomitant of due process, rather than a specific requirement of the deportation statute. Thus, in *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103 (1927) the alien's appeal to this Court rested on a contention that he had been denied rights guaranteed by the federal Constitution, rather than by statute (p. 105). Although the appeal was unsuccessful, this Court stated, at p. 106:

> Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.

And in *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459, 464 (1920)[14] this Court observed that in re-

[14] This was an exclusion case but the court's comments are intended to be generally applicable.

viewing the actions of immigration officers, it considered

> the question whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law * * *. The acts of Congress give great power to the Secretary of Labor[15] * * *. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power * * *.

Other decisions containing similar expressions are *Bilokumsky* v. *Tod,* 263 U. S. 149, 157 (1923); *Kessler* v. *Strecker,* 307 U. S. 22, 34 (1939); *Tisi* v. *Tod,* 264 U. S. 131, 132 (1924); *Low Wah Suey* v. *Backus,* 225 U. S. 460, 468 (1912); *Tang Tun* v. *Edsell,* 223 U. S. 673, 681 (1912).

Petitioner contends that the due process requirement of an opportunity for a hearing in deportation proceedings is as much a part of the immigration statute as though it had been spe-

[15] Authority in deportation cases now is confided to the Attorney General under Reorganization Plan No. V, 5 F. R. 2223, effective June 14, 1940, 5 F. R. 2132.

cifically prescribed by the Congress. Certainly that right to a hearing is one "required by law" within the meaning of the administrative procedure bills which were before the Congress in 1941. But Congress deliberately abandoned this phrase in favor of "required by statute", with the obvious purpose of making certain and predictable the application of the Administrative Procedure Act. While petitioner cites such cases as *A. F. of L.* v. *Watson,* 327 U. S. 582 for the proposition that the word "statute" when used in Federal statutes includes "Constitution", those cases stand for no such sweeping proposition, but rather for a rule of construction that in certain contexts the word "statute" includes legislative action in the form of constitutional provision and administrative rules. Such a guide to interpretation obviously has no application here where it is clear that the reference in Section 5 of the Administrative Procedure Act to hearings "required by statute" related only to hearings specifically required by Congress.

C. THE SUBSEQUENT JUDICIAL AND LEGISLATIVE HISTORY

On May 5, 1948, Judge Goldsborough held, in *Eisler, et al.* v. *Clark,* 77 F. Supp. 610 (D. D. C.), that deportation hearings are governed by Sections 5 and 11 of the Administrative Procedure Act. He concluded, as the petitioner here contends, "that the courts have read due process into the Act

[the Immigration Act] and due process means a hearing, and that therefore hearing is an integral part of the Deportation Act; in fact, just as much as if the Act itself in words stated that a hearing should be held." This was the first judicial decision on this question.

It was obviously important for this question to be determined finally as soon as possible. Accordingly, the Department of Justice asked Congress for legislation specifying that deportation proceedings should not be subject to the Administrative Procedure Act. Bills were introduced, S. 2755 and H. R. 6652, both 80th Cong., 2d Sess., which would have exempted from all of the provisions of the Administrative Procedure Act except Section 3 "functions or proceedings authorized or required pursuant to the immigration or nationality laws." H. R. 6652 was reported favorably on June 2, 1948, by the House Committee on the Judiciary, together with a report, H. Rep. 2140, 80th Cong., 2d Sess., discussing the problem at length. A subcommittee of the Senate Committee on the Judiciary held hearings on S. 2755. Representatives of the Department of Justice took the position that the *Eisler* decision was erroneous but that there was need for early clarification by legislation.[16] S. 2755 was

[16] Unpublished testimony on file with the Committee, pp. 55, 58, 80–82. It is interesting to observe that Mr. Ashley Sellers, Chairman, National Committee, Section on Administrative Law, American Bar Association (which actively

favorably reported on June 10, 1948, but in a form which would have amended the Immigration Act to direct squarely that deportation hearings be conducted by immigrant inspectors. Congress adjourned on June 19, 1948, without taking further action on either bill.

However, beginning with the unreported decision of Judge Coxe in *Fajardo* v. *United States* (S. D. N. Y.) in June 1948, reaching a conclusion directly opposite to that of the *Eisler* case, and Judge Holtzoff's decision in the instant case in July 1948, every Federal court which has considered the question has refused to follow *Eisler* v. *Clark* and has held that deportation hearings need not be conducted by hearing examiners appointed pursuant to Section 11 of the Administrative Procedure Act." Many of these subsequent decisions were based upon Section 7 (a) of the Administrative Procedure Act. In addition, however, in *Bersoff* v. *Donaldson,* 174 F. 2d 494, the Court of Appeals

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sponsored the proposed legislation culminating in the Administrative Procedure Act) expressed the opinion, in testimony before the Senate Judiciary Committee, that the *Eisler* case was erroneously decided. *Hearings before Senate Judiciary Subcommittee on Immigration and Naturalization on S. 2755, 80th Cong., 2d Sess. (1948)*, p. 102. (Herein referred to as Senate Hearings (1948).)

[11] The *Eisler* case is now pending on appeal in the Court of Appeals for the District of Columbia under the name of *Potash* v. *McGrath.* Certiorari in advance of judgment by the Court of Appeals was denied by this Court on November 14, 1949, No. 366.

for the District of Columbia held that mail fraud proceedings were not subject to Sections 5, 7 and 8 because the mail fraud statutes "do not in terms require a hearing". For this reason, the proposed clarifying legislation referred to above became less urgent. The substance of H. R. 6652 referred to above was reintroduced in the 81st Congress as part of H. R. 10, Section 2 of which provides that "Nothing in the provisions of Sections 5, 7, 8 and 10 of the [Administrative Procedure Act] shall be applicable to the provisions of any law relating to the immigration, exclusion, expulsion, or registration of aliens." H. R. 10 was favorably reported on August 4, 1949, by the House Committee on the Judiciary and is pending before the House. H. Rep. 1192, 81st Cong., 1st Sess., p. 11.

Thus, the Congress, with specific knowledge that Sections 5, 7 and 11 of the Administrative Procedure Act have been construed by the Service as not applying to deportation proceedings, has taken no action indicating disagreement with that interpretation. To the contrary, when the administrative construction was initially rejected in *Eisler* v. *Clark*, supra, is at least arguable that Congress was prepared to specifically confirm the administrative construction by clarifying legislation.

While Section 5 of the Administrative Procedure Act does not except deportation hearings by name, it seems clear that Congress was aware

that the application of the Act to deportation proceedings would create excessive administrative difficulties. There is no reason to believe that Congress was dissatisfied with the conduct of deportation proceedings. During the 1941 Senate hearings, Congress was fully informed of the desirability of keeping the organization of the Immigration and Naturalization Service flexible in order to meet diversified needs and changing conditions. The reference in the 1945 House Report (*supra,* p. 28) to the conclusions reached in the 1941 Senate Hearings (*supra,* p. 24) indicate that Congress intended to avoid the practical difficulties and financial burdens that might be entailed if immigration procedures were required to conform with the Administrative Procedure Act. The testimony of Major Schofield and other available evidence persuaded Congress that these were not the formalized types of hearings within its contemplation in enacting this legislation. During the fiscal year 1948 there were 31,540 deportation hearings and deportation actually occurred in 20,371 cases. *Annual Report,* Commissioner of Immigration and Naturalization (1948), p. 23. Current hearings are being scheduled at a lower rate, somewhat under 2,000 monthly. In the great preponderance of these hearings, like that in the instant case, the factual and legal issues are relatively simple and are decided expeditiously.

The Immigration and Naturalization Service functions throughout the continental United States, and in Alaska, Hawaii, Puerto Rico, and the Virgin Islands. Its operations are conducted under varying conditions—at seaports facing the Atlantic and Pacific Oceans and the Gulf of Mexico, along the land frontiers and the Great Lakes, and in the internal areas of the United States. The majority of deportations concern migrant laborers from adjacent countries who are unable to raise bail, and whose deportation cases must be decided with dispatch in order to avoid prolonged incarcerations.

In the different regions of operation there are varying workloads and administrative problems. For example, in the large seaports and at some land border points, deportation hearings arise in substantial volume and it is feasible to assign to such hearings a regular staff of hearing examiners. In 90% of the field offices, however, deportation hearings are infrequent and do not require the full time services of an immigrant inspector. At such offices immigrant inspectors perform other duties, such as the inspection of arriving aliens, when not conducting deportation hearings. A requirement that hearing examiners be restricted only to the hearing of deportation cases would result in a loss of time, money and mobility, and would unnecessarily prolong the

period of detention endured in many cases while awaiting a final disposition.[18]

We believe the evidence is overwhelming that Congress took into account all of these factors, that it chose the language in Section 5 with great care, that it unquestionably considered deportation proceedings in framing its exemptions, and that it desired to limit the application of the procedural provisions of the Administrative Procedure Act to adjudications specifically required by statute to be made after a hearing. Consequently, under the explicit language of Section 5, fortified by an understanding of the legislative history and purpose, we believe the conclusion is inescapable that deportation proceedings are exempt from the operation of the procedural provisions of the Administrative Procedure Act.

II

THE EXCEPTION IN SECTION 7(A) OF THE ADMINISTRATIVE PROCEDURE ACT FOR THE CONDUCT OF PROCEEDINGS BY OFFICERS SPECIALLY PROVIDED FOR BY STATUTE PERMITS IMMIGRANT INSPECTORS TO CONDUCT DEPORTATION HEARINGS

Section 7 (a) of the Administrative Procedure Act requires that adjudicatory hearings subject

[18] Also meriting consideration is an estimate that if the petitioner herein prevails it will be necessary to reprocess and redetermine approximately 10,000 deportation orders. *Senate Hearings* (1948), p. 55.

to the Act be conducted by the head of the agency concerned or by a hearing examiner appointed in accordance with Section 11. However, Section 7 (a) also provides that

> nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

This exception to Section 7 (a) provides an independent basis for affirming the decision of the court below. The Government here contends that Section 16 of the Immigration Act of 1917, 8 U. S. C. 152, provides for the conduct of deportation proceedings by immigrant inspectors within the meaning of the quoted exception to Section 7 (a). If this contention is correct, the requirement of Section 11 of the Administrative Procedure Act for rotation of hearing examiners appointed pursuant to that section is obviously inapplicable. Also, the express exception of Section 7 (a) for certain statutory hearing officers necessarily carries with it as much of an exception from the general separation of functions requirements of Section 5 (c) as is necessary to give effect to the express exception.

In Point I above, it was contended that hearings in deportation proceedings, although required by due process, have not been specifically required by Congress, and that therefore such

proceedings were in no way subject to the provisions of Sections 5, 7, 8 and 11 of the Administrative Procedure Act. If, however, it is held that deportation hearings are required by statute, then we believe that it is difficult to escape the conclusion that Congress has also "specially provided for" the conduct of such hearings by immigrant inspectors. There is nothing inconsistent in these alternative positions, since Section 16 of the Immigration Act of 1917, enacted long after the due process requirement of opportunity for hearing was applied to deportation proceedings, is concerned solely with furnishing immigrant inspectors with enforcement powers rather than with conferring procedural rights upon aliens. In effect, Section 16 vests solely in immigrant inspectors the power to effectively conduct whatever hearings may be required by the Fifth Amendment in deportation proceedings.

It should also be noted that the exception in Section 7 (a) for certain statutory hearing officers is not necessarily an exception from all of the provisions of Sections 5, 7 and 8. Where the exception of Section 7 (a) is applicable, the administrative agency involved is freed from the necessity of using hearing examiners appointed pursuant to Section 11.[19] As will be discussed

[19] This is not a general loophole from the general requirements of Sections 7 (a) and 11, because few Federal regulatory statutes require or provide for the conduct of hearings by a particular officer or class of officers. See *infra*, p. 53, fn. 26.

later, hearing officers within this exception are also excepted from the general separation of functions requirements of Section 5 (c) to the extent necessary to give effect to the specific exception of Section 7 (a). It is unnecessary to determine in this case whether the other provisions of Sections 5, 7 and 8 remain applicable to the administrative proceedings in question. If this Court holds that deportation hearings are required by statute within the meaning of the introductory clause of Section 5, but that pursuant to Section 7 (a) such hearings may be conducted by immigrant inspectors notwithstanding the provisions of Section 5 (c), then it may be that Section 8 and the other parts of Sections 5 and 7 will be applicable to deportation proceedings.

However, it is believed that the existing deportation procedures are in substantial, if not literal, compliance with these latter provisions. In any event, no failure to comply with such provisions is asserted by petitioner. Accordingly, the decision below can be affirmed even on the basis of the limited exception provided by Section 7 (a). In fact, the actual effect upon deportation proceedings generally would be the same as a holding that such proceedings were in no way subject to Sections 5, 7, 8 and 11, because the only real issue in all these cases is whether deportation hearings must be conducted by a hearing examiner appointed in accordance with Section 11.

A. SECTION 16 OF THE IMMIGRATION ACT OF 1917 "SPECIFICALLY PROVIDES" FOR THE CONDUCT OF DEPORTATION PROCEEDINGS BY IMMIGRANT INSPECTORS WITHIN THE MEANING OF SECTION 7 (A) OF THE ADMINISTRATIVE PROCEDURE ACT

The Court of Appeals and the District Court below, the Court of Appeals for the Second Circuit, and a number of district courts throughout the country, have held that by Section 16 of the Immigration Act of 1917 Congress has "specially provided" for the conduct of deportation hearings by immigration inspectors within the exception of Section 7 (a) of the Administrative Procedure Act.[20] No court has reached a contrary conclusion.[21]

[20] In addition to the decisions in the instant case, cases which have ruled directly on this point are *Azzolini* v. *Watkins*, 172 F. 2d 897 (C. A. 2, 1949); *Lee Wo Shing* v. *Clark*, 175 F. 2d 194 (C A. 2, 1949), certiorari applied for; *Yanish* v. *Wixon*, 81 F. Supp. 499 (N. D. Cal., 1948), appeal pending; *Valenti* v. *Clark*, 83 F. Supp. 167 (D. D. C. 1949); *Prince* v. *Commissioner*, unreported, N. Dist. of Ohio, E. D., 1949, Civ. No. 25968; *Chow Kau* v. *Clark*, 83 F. Supp. 969 (D. D. C. 1949); *Chin Fat Neu* v. *Zimmerman*, unreported, E. Dist. of Pa. 1949, Civ. M–1282; *Ottesen* v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 50–5; *Perfumo* v. *Shaughnessy*, unreported, S. Dist. of N. Y. 1949, Civ. 49–569. In *Eisler* v. *Clark*, *supra*, Judge Goldsborough did not rule on the Section 7 (a) point. In addition, various courts have ruled that boards of special inquiry, which conduct exclusion proceedings, likewise are exempt under sec. 7 (a); *Johnson* v. *Watkins*, 170 F. 2d 1009 (C. A. 2, 1948); *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal., 1948); *Frisch* v. *Miller*, unreported, D. C., Fla. 1949, No. 3192–M–Civil. In *Johnson* v. *Shaughnessy*, 336 U. S. 806 (1949) this Court found it unnecessary to rule on the latter question in disposing of the case.

Sec. 16 of the Immigration Act of 1917, 8 U. S. C. 152, expressly confers upon immigrant inspectors authority to conduct the "examination of aliens arrested within the United States under this Act" and "to administer oaths and to take and consider evidence touching the right of any alien to * * * reside in the United States, and, where such action may be necessary, to make a written record of such evidence." We agree with the courts below, and the other courts which have ruled on the question, that this

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Typical comments have been: "It is manifest from a review of the Congressional proceedings antedating the enactment of the Administrative Procedures Act, and the clear context of the Act itself, that it was not the intention of Congress to interfere with or usurp traditional statutory proceedings of this nature conducted by the Immigration Service" *Yanish* v. *Wixon*, *supra*. "After a consideration of its purpose and scope, the Court is of the opinion that the Administrative Procedure Act does not control deportation proceedings by the Attorney General. This is so because the Administrative Procedure Act both expressly and impliedly excludes matters of this nature from its application" *Yiakoumis* v. *Hall*, 83 F. Supp. 469 (E. D. Va., 1949), appeal pending.

[21] Not involved herein is another currently litigated issue under the Administrative Procedure Act—whether sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009, has altered existing forms of judicial review of immigration orders. *Trinler* v. *Carusi*, 166 F. 2d 457, 168 F. 2d 1014 (C. A. 3, 1948); *Yanish* v. *Wixon*, 81 F. Supp. 499 (N. D. Cal., 1948); *Valenti* v. *Clark*, 83 F. Supp. 167 (D. D. C., 1949); *Yiakoumis* v. *Hall*, *supra*; *Prince* v. *Commissioner*, *supra*.

grant of authority fits exactly within the exception of Section 7 (a).

Petitioner contends that Sec. 16 of the Act of 1917 bears only on procedures relating to the admission, and not the deportation, of aliens. Similar contentions have been advanced and rejected on other occasions in the past. *Loufakis* v. *United States,* 81 F. 2d 966 (C. A. 3, 1936); *Graham* v. *United States,* 99 F. 2d 746 (C. A. 9, 1938); *Ex parte Kurth,* 28 F. Supp. 258 (S. D. Cal., 1939); *Azzolini* v. *Watkins,* 172 F. 2d 897 (C. A. 2, 1949). Such a contention defies the consistent administrative interpretation of the statute over all the years of immigration enforcement, which certainly is entitled to the greatest weight. *Costanzo* v. *Tillinghast,* 287 U. S. 341 (1932); *Lucas* v. *American Code Co.,* 280 U. S. 445 (1930). It is definitely not true, as petitioner declares (p. 17), that the Attorney General and the Immigration and Naturalization Service have never regarded Sec. 16 as relating to formal deportation proceedings. Indeed, that section provides the only authority for immigrant inspectors to administer oaths and to take testimony in deportation proceedings.[22] *United States* v. *Doshen,* 133 F. 2d 757

[22] This interpretation is confirmed by the so-called *Dimock Report,* in the quotation which appears at pp. 16–17 of the petition.

(C. A. 3, 1943).[22] And petitioner has not taken into account the many diverse provisions of Sec. 16, relating to entry *and* expulsion proceedings, subpoenas, and criminal penalties. Moreover, petitioner's attempted construction overlooks, in our view, the plain language of Sec. 16 itself, which speaks of an "examination" of aliens believed to be illegally in the United States, *i. e.*, aliens who may be deported but not excluded. Clearly these specifications make immigrant inspectors "officers specially provided for" by statute for the conduct of deportation proceedings within the meaning of Sec. 7 (a) of the Administrative Procedure Act.

Petitioner also contends that the exception of Section 7 (a) relates only to statutory hearing officers possessing special and unique qualifications not possessed by immigrant inspectors. While isolated statements to that effect may be found in the legislative history (see Pet. p. 18), this is not what Congress did in Section 7 (a). That section clearly provides that administrative

[22] Petitioner appears to base much of his contention on the ground that the powers vested by Section 16 in immigrant inspectors may be exercised only for the purposes of that section, in that Section 16 of the Immigration Act of 1917, as set forth in 8 U. S. Code 152, refers to "aliens arrested within the United States *under this section*." However, as originally enacted, 39 Stat. 886, the words used are "*under this Act*," thereby including aliens arrested for deportation pursuant to Section 19 of that Act. [Emphasis supplied.]

proceedings governed by the Administrative Procedure Act may continue to be conducted "by or before boards or other officers specially provided for by or designated pursuant to statute." The natural and literal reading of this language is confirmed by legislative history indicating a clear purpose of Congress not to repeal *pro tanto* other statutes in which it had specifically required or authorized the conduct of hearings by particular officers or classes of officers.

The exception in Section 7 (a) originated in recognition of the fact that some Federal regulatory statutes provided for the participation of state officials in the conduct of hearings.[34] Thus, the 1941 bills[35] embodying the recommendations of the Attorney General's Committee on Administrative Procedure excepted from their hearing examiner requirements hearings which by statute were conducted by a state officer. As late as 1945, when H. R. 1203 was the subject of hearings before the House Committee on the Judiciary, the exception merely included hearings before "State representatives as authorized by statute." During those hearings, Commissioner Aitchison of the Interstate Commerce Commission pointed out that Section 7 (a) as it then read would repeal Section

[34] See, for example, Section 13 (3) of the Interstate Commerce Act, 49 U. S. C. 13 (3).

[35] Section 309 (b) of S. 674 and Section 301 of S. 675; both 77th Cong., 1st sess. (1941).

17 (2) of the Interstate Commerce Act (49 U. S. C. 17 (2)) which authorizes the Commission to hold hearings before boards of three or more "examiners, directors or assistant directors of bureaus, chiefs of sections, and attorneys." House Hearings, pp. 70–73, S. Doc. 248, pp. 116–120.

In June 1945, the Senate Committee on the Judiciary issued a comparative committee print in which the Section 7 (a) exception was broadened to refer to "officers specially designated by statute." Sen. Doc. 248, p. 28. If this language had been finally adopted, the exception might have been limited to cases in which a particular officer is designated specifically by a statute to conduct a particular type of hearing, as 19 U. S. C. 1641 requires that hearings to determine whether a customhouse broker's license should be suspended or revoked must be held by the collector or chief officer of the customs. It probably would not have met Commissioner Aitchison's objection. However, as reported by both Judiciary Committees, the bill provided, as finally enacted, an exception from the requirement of Section 11 hearing examiners for proceedings conducted "before boards or other officers specially provided for by or designated pursuant to statute." Under this broadened language, the exception clearly applies where a statute in terms requires or authorizes

an agency to designate a specific officer or employee or one of a specific class of officers to conduct a proceeding.[28] The clear purpose of this change to leave unaltered other statutory provisions authorizing the conduct of hearings by particular classes of officers, such as those enumerated in Section 17 of the Interstate Commerce Act, is confirmed by the following exchange during the Senate debate (Sen. Doc. 248, p. 307):

> Mr. REED. I confess a lack of understanding of the bill. * * * Over the years the Congress has laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. All that is prescribed by statute. Is there anything in this bill that would interfere with that procedure?

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[28] The Department of Justice analysis of S. 7 prepared for the Senate Committee on the Judiciary lists the following examples (Sen. Doc. 248, pp. 227-228):

> (1) joint hearings before officers of the Federal agencies and persons designated by one or more States, (2) where officers of more than one agency sit, (3) quota allotment cases under the Agricultural Adjustment Act of 1938, (4) marine casualty investigation boards, (5) registers of the General Land Office, (6) special boards set up to review the rights of disconnected servicemen (38 U. S. C. 693h) and the rights of veterans to special unemployment compensation (38 U. S. C. 696h), and (7) boards of employees authorized under the Interstate Commerce Act (49 U. S. C. 17(2)).

Mr. McCarran. There is nothing in this bill which would interfere with such procedure.

* * * * *

Mr. Reed. And it would not change its (the Commission's) method and rule of doing business when the method and rule is founded on statutory authority?

Mr. McCarran. That is correct.

Mr. Reed. I thank the Senator.

Mr. McCarran. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. *We did not wish to disrupt or change anything that was statutory;* and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure. [Emphasis supplied.]

Here, Congress in Section 16 of the Immigration Act has clearly provided for the conduct of deportation proceedings before immigrant inspectors. In fact, Section 16 vests solely in immigrant inspectors the powers necessary for the effective conduct of such proceedings.

B. THE EXCEPTION TO SECTION 7 (A) WHICH PERMITS THE CONDUCT OF DEPORTATION HEARINGS BY IMMIGRANT INSPECTORS ALSO EXEMPTS THEM FROM THE GENERAL REQUIREMENTS OF SECTION 5 (C) TO THE EXTENT NECESSARY TO GIVE EFFECT TO THE EXCEPTION

Petitioner's final contention is that even if the exception to Section 7 (a) permits immigrant inspectors to conduct deportation hearings, it exempts them only from the provisions of Section 11 as to the selection and status of hearing examiners, and not from the separation of functions requirements of Section 5 (c). Specifically, it is asserted that there was a failure to comply with the requirement of the second sentence of Section 5 (c) that the officer presiding at the hearing shall not "be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency." (R. 3.)

It is admitted that the deportation hearing in this case was conducted by an immigrant inspector who was under the general supervision of an officer of the Immigration and Naturalization Service who also supervises the performance of investigating functions in deportation cases. Accordingly, if this provision of Section 5 (c) were applicable here, it would be arguable that

the hearing was conducted in violation of section 5 (c)."

However, it seems clear that this provision of Section 5 (c) is not applicable to the conduct of hearings by boards or other officers "specially provided for" by statute. It is illogical to assume that Congress desired to permit certain types of officers designated by other statutes to continue to preside over hearings, and yet simultaneously provided that the relationship with the agency by which Congress identified and designated them should preclude them from performing the functions of hearing officers. In any event, the express language of Section 7 (a) rebuts petitioner's contention. It provides that "*nothing in this Act shall be deemed to supersede the conduct* of specified classes of proceed-

[11] It is not true under current practice, however, that immigrant inspectors generally conduct investigations preliminary to the institution of deportation proceedings. At present a corps of 462 investigators, as distinguished from immigrant inspectors, stationed throughout the United States, conducts at least 90% of all investigations. In addition members of the Immigration Border Patrol receive investigative assignments in areas proximate to the land borders. Only in small offices, to which no investigators are allocated because of the meager volume of work, is it sometimes necessary for immigrant inspectors to undertake investigations. And the regulations forbid an immigrant inspector who conducted an investigation to act as hearing officer in that case, without the alien's consent. 8 CFR 150.6 (b). The present authorized force of immigrant inspectors aggregates 1173, of whom 1018 are assigned to the inspection of arriving aliens and 155 to deportation hearings.

ings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute" (emphasis supplied). It would be difficult to use words more appropriate for extending to such proceedings such an exemption from the requirement of the *Act*, and not merely of that section, as would enable such boards and officers effectively to "conduct" such proceedings.

This plain and literal construction is confirmed by the legislative history. As noted above, when the administrative procedure bill, H. R. 1203, was before the House Committee on the Judiciary, Section 7 (a) then provided that "There shall preside at the taking of evidence * * * State representatives as authorized by statute * * *". It would seem that as thus constructed, Section 7 (a) would have left such State officers subject to every other provision of the Act. During the hearings before that Committee, the broader problems of officers authorized by other statutes to conduct hearings were raised (*supra*, pp. 51–52). Thereafter, Section 7 (a) was completely rewritten to provide as enacted that "nothing in this Act shall be deemed to supersede the conduct" of "proceedings" by officers "specially provided for" by statute. This change in language makes it clear that the exception was intended to permit such officers to act without changing their status in the employing agency. Thus, the requirement of Section 5 (c) here invoked, which would radically

alter the relationship of an immigrant inspector to the Service, is clearly not applicable.

It seems clear, therefore, that immigrant inspectors may function as hearing officers in deportation cases notwithstanding that they are under the supervision or direction of officers who may be said to be performing investigating or prosecuting functions.[23]

CONCLUSION

We believe that the decision below should be sustained, either on the ground that hearings in

[23] No other contentions are made with respect to the applicability of Section 5 (c). It may be noted that as a matter of good administration, the Immigration and Naturalization Service follows to a great extent the separation of functions principles of that subsection. In the larger district offices, the immigrant inspectors who conduct deportation hearings are engaged in that work full time, and are under the immediate supervision of officers who have no investigating or prosecuting duties. Where, in a smaller office, the same inspector both conducts hearings and investigates cases, he may not preside at the hearing in a deportation case which he has investigated without the alien's consent. 8 CFR 150.6 (b).

At the higher levels of adjudicative responsibility, however, the delineation of functions is now complete. In the Central Office, where the case is initially decided, there is an Adjudications Division, directed by an Assistant Commissioner, which considers and determines deportation cases. That Division has no allotted functions extraneous to adjudication. Investigations and prosecutions, at the Central Office level, are within the domain of the Enforcement Division, headed by an Assistant Commissioner. Of course, the Board of Immigration Appeals, which considers appeals from any deportation orders which may be issued by the Commissioner, acts entirely in an adjudicative capacity.

deportation cases are not required by statute within the meaning of Section 5 and are therefore excepted from all of the provisions of Sections 5, 7, 8 and 11, or on the ground that Section 7 (a) excepts the conduct of deportation proceedings from the requirements of Sections 5 (c), 7 and 11 here invoked. Accordingly, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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